91-597

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

HOUSTON BUILDING SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

VEDA MOORE
(Counsel of Record)
THOMAS W. MOORE
MOORE AND MOORE
10370 Richmond Avenue
Suite 720
Houston, Texas 77042
(713) 977-0964

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED*

1. Whether the labor law doctrine of successor employer should be extended to impose successor liability upon a service company who is awarded a Federal Government janitorial service contract in competitive bidding with a totally unrelated predecessor because the successful bidder temporarily employs the former employees of the predecessor company.

2. Whether the forced temporary employment of a predecessor service company's employees which was necessitated solely by a delay in the government's issuance of required security clearances for the successful bidder's employees, automatically subjects the successful bidding company to successor employer liability even though there is no sale or transfer of assets or ownership between the two competing companies.

*** The questions presented are identical to the favorable decision of Mr. Chief Justice Rehnquist on the issue in his dissent in *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 296 (1972), [which dissent was joined by then Mr. Chief Justice Brennan, and Mr. Justice Powell].**

LIST OF PARTIES

The parties to the proceedings below were Houston Building Service, Inc. (petitioner here and respondent below) and the National Labor Relations Board (respondent here and petitioner below).

Unlicensed Division Of District No. 1, MEBA/NMU, AFL-CIO, was Intervenor below.

Houston Building Service, Inc. has no parent corporation or subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 3

STATUTES 3

STATEMENT 3

REASONS FOR GRANTING THE PETITION 7

I. THE QUESTIONS PRESENTED IN THIS PETITION HAVE BEEN DECIDED IN FAVOR OF PETITIONER BY THE CHIEF JUSTICE IN HIS DISSENT IN *NLRB V. BURNS INT'L SECURITY SERVS., INC.*, 92 S.CT. 1577, 1588-1591 WHERE HE STATES THAT SUCCESSOR LIABILITY SHOULD NOT BE IMPOSED WHERE THERE IS A MERE TRANSFER OF EMPLOYEES FROM ONE UNRELATED ENTITY TO ANOTHER ... 7

II. THE COURT BELOW MISAPPLIED THIS COURT'S HOLDING IN *FALL RIVER DYEING & FINISHING CORP. V. NLRB*, 107 S. CT. 2225 (1987) TO IMPERMISSIBLY EXTEND THE SUCCESSOR EMPLOYER DOCTRINE AND PRODUCE GROSSLY UNJUST RESULTS 10

TABLE OF CONTENTS – Continued

Page

III. BECAUSE OF THE IMPORTANCE OF THE ISSUE OF SUCCESSORSHIP IN LABOR LAW AND THIS COURT'S RESPONSIBILITY TO ASSURE THAT THE BOARD APPLIES RATIONAL RULES IN DETERMINING SUCCESSOR LIABILITY, THIS COURT SHOULD GRANT THIS PETITION AND PROVIDE GUIDANCE TO THE BOARD AND THE COURTS BELOW ON THIS UNSETTLED ISSUE 13

CONCLUSION 13

APPENDICES:

Appendix A: Slip Opinion issued by the United States Court of Appeals for the Fifth Circuit on July 2, 1991.....1a

Appendix B: Opinion of National Labor Relations Board, Washington, D.C. dated September 29, 1989 [with a copy of the Decision of the ALJ dated December 16, 1988 attached].....10a

Appendix C: 29 U.S.C. § 160(e), and § 160(f), National Labor Relations Act, as amended, § 10(e)..... 44a

Appendix D: 29 U.S.C. § 158(a)(5) and (1), National Labor Relations Act, as amended.... 54a

TABLE OF AUTHORITIES

Page

CASES:

Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 107 S. Ct. 2225 (1987) 7, 10, 11, 12

International Union of Elec., Radio and Mach. Workers v. N.L.R.B., 604 F.2d 689 (D.C. Cir. 1979) 7

N.L.R.B. v. Burns Internaional Security Services, Inc., 406 U.S. 272 (1972), 92 S. Ct. 1571 (1972) 7, 8, 10, 11

FEDERAL STATUTES:

28 U.S.C. § 1254 3

29 U.S.C. § 151 5

29 U.S.C. § 158 3

29 U.S.C. § 160 ..... 2, 3, 5

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HOUSTON BUILDING SERVICE, INC.,

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NATIONAL LABOR RELATIONS BOARD,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Houston Building Service, Inc. ("HBS"), respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Fifth Circuit entered July 2, 1991. The National Labor Relations Board, ("NLRB"), petitioned the Fifth Circuit Court of Appeals for an enforcement Order against HBS for failing to recognize and bargain with a Union representing a group of employees who formerly worked for a service company employer who had no business dealings and no relationship whatever to HBS. The former company had been servicing a janitorial service contract with the United States Government, General Services Administration, ("GSA"). The government janitorial contract was

subsequently awarded to HBS, who was a competitive bidder for the contract against the former service company, Housekeepers Maintenance Service and Supply, Inc., ("Housekeepers").

The Federal Government buildings to be cleaned under the contract required that the workers have security clearance to enter the buildings and because of the government's delay in issuing security clearances to HBS' employees, HBS was forced to temporarily employ the workforce of the previous employer pending receipt of security clearances for its own workers.

OPINION BELOW

The Regional Director of the NLRB found in favor of HBS; the Board appealed and an ALJ rendered a Decision and Order that HBS was a successor employer. The United States Court of Appeals for the Fifth Circuit GRANTED the Board's petition for enforcement of the Board's Order.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *National Labor Relations Board v. Houston Building Service, Inc.*, No. 90-4439, slip op. at 4863 (5th Cir. Jul. 2, 1991), and is reproduced as Appendix A. The case was before the United States Court of Appeals for the Fifth Circuit Court upon Application of the National Labor Relations Board ("the Board" or "NLRB") for an Enforcement of the Board's Order against Houston Building Service, Inc., ("HBS") entered on September 29, 1989. Federal jurisdiction of the Board's Application was pursuant to § 10(2) of the Act, [29 U.S.C.

§ 160(e)]; the Board's Decision and Order was reported at 296 NLRB No. 101 which is reproduced as Appendix B.

JURISDICTION

Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on July 2, 1991 by writ of certiorari.

STATUTES

Reproduced at Appendix C is 29 U.S.C. § 160(e), National Labor Relations Act, as amended, § 10(e). Also Reproduced at Appendix C is 29 U.S.C. § 160(f). Reproduced at Appendix D is § 158(a)(5)(1) of the National Labor Relations Act.

STATEMENT

1. The United States Court of Appeals for the Fifth Circuit GRANTED the Board's Application for Enforcement of its Order of September 29, 1989 adopting the Decision and Order of an Administrative Law Judge that HBS, a janitorial service company, by temporarily hiring the former employees of the predecessor service company pending receipt of government security clearances for its own workers, was a successor employer and thereby violated § 8(a)(5) and (1) of the National Labor Relations Act, as amended ("the Act") by refusing to recognize and

bargain with the Union which had represented the employees when they were employed by the former service company.

2. Between 1980 and 1987 five different service companies contracted with GSA to perform janitorial cleaning services in certain Federal Government buildings in Austin, Texas. The contract between GSA and Housekeepers Maintenance Service and Supply, Inc., ("Housekeepers"), was let out for bids and was awarded by GSA to HBS **sometime after November 19, 1987,** [despite competitive bidding for the contract by Housekeepers]. **The contract with HBS had a commencement date of December 1, 1987.** Although the previous five service companies who contracted with GSA had elected to permanently hire the existing workforce of the previous company at the time of each contract changeover, HBS intended to use a different work crew to service its contract with GSA. There was testimony in the record that GSA had expressed displeasure with the quality of services of Housekeepers employees. HBS bid the contract based upon use of its own work crew.

3. The Federal Government buildings to be cleaned under the contract required that each worker have a security clearance to enter the buildings. A few weeks prior to contract start up date of December 1, 1987, HBS applied to the Federal Government for security clearances for several workers HBS intended to use to service its contract with GSA. These workers were not previously employed by Housekeepers. There was testimony that GSA advised HBS it would take approximately one week to issue the necessary clearances. However, due to the government's delay in issuing the security clearances to

HBS workers, on the morning of December 1, 1987, the HBS workers had not received the required security clearance and HBS had to temporarily employ the prior Housekeeper employees because they were the only people with clearances to clean the buildings; otherwise, HBS would have faced grave legal and economic consequences because it would have been forced to default on the GSA contract on its commencement date.

The ALJ's Decision and Order does not find that HBS was motivated by an anti-union animus in its conduct with respect to this case. HBS replaced former Housekeeper employees as HBS received security clearances for its workers during the following approximate five week period after December 1st. However, the ALJ found that because the employees viewed their employment situation as essentially unchanged, HBS was automatically subjected to successor employer liability.

4. The NLRB petitioned the Fifth Circuit Court for an enforcement order based upon Federal jurisdiction under § 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(e). HBS opposed enforcement on the grounds that the Board had committed an error of law because the labor law doctrine of successor employer did not apply to HBS because there was no sale of assets or transfer of ownership or other relationship between HBS and Housekeepers and the temporary employment of the former Housekeeper employees was the result of legitimate business necessity. It was the position of HBS that the policy underlying the successor employer doctrine, and the law, **requires the Board to focus on whether there has been a change in ownership or corporate structure, or transfer of assets,** between the

two enterprises as well as a finding that the second corporation is actually **continuing the business operations of the first** before the Board considers the viewpoint of the employees with respect to their employment situation in determining whether a subsequent employer is a successor employer required to perform obligations voluntarily undertaken by the predecessor employer who has transferred ownership or sold its assets to the subsequent employer. HBS argued that the doctrine could not logically be extended to a factual situation involving a mere naked shifting of a group of employees from one unrelated employer to another without totally disregarding the policy underlying the successor doctrine.

5. The Court below did not address HBS' issue of law but decided the case on the basis of *whether the evidence was sufficient* to support the Board's determination that HBS was a successor employer and thereby had violated the Act by failing to recognize and bargain with the Union who had represented the former Housekeeper employees.

The Court below holds that HBS was automatically liable as a successor employer because the former Housekeeper employees considered themselves in the same employment situation when they commenced working for HBS. In a footnote on page 6 of the Court's decision, the Court rejects HBS' arguments concerning the significance of the fact that no sale or transfer of assets had taken place and stated **that a sale of assets/transfer of ownership *was only one factor* to be considered.** [emphasis added]. The Court stated in this footnote that its core inquiry was whether, under the totality of circumstances presented, "the second corporation basically has

continued the business and workforce of the first" and as support for such "core inquiry analysis" the Court cited this Court's holdings in *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S.Ct. 2225, 2236 (1987).

The opinion of the Fifth Circuit Court, on p. 6, also contains the following quotation from *International Union of Elec., Radio and Mach. Workers v. NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979):

> "Because the 'operations . . . remain[ed] essentially the same ***after the transfer of ownership,***' . . . " [emphasis added by petitioner].

There was no transfer of ownership in this case.

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED IN THIS PETITION HAVE BEEN DECIDED IN FAVOR OF PETITIONER BY THE CHIEF JUSTICE IN HIS DISSENT IN *NLRB V. BURNS INT'L SECURITY SERVS., INC.*, 92 S.CT. 1577, 1588-1591 WHERE HE STATES THAT SUCCESSOR LIABILITY SHOULD NOT BE IMPOSED WHERE THERE IS A MERE TRANSFER OF EMPLOYEES FROM ONE UNRELATED ENTITY TO ANOTHER

Mr. Chief Justice Rehnquist in *Burns* determined that the successor employer doctrine should not apply to a "naked transfer of employees". That is the question presented in this Application. The decision of the Court below results in a gross miscarriage of justice as well as

an impermissible extension of the successor employer doctrine beyond all reasonable limits. The decision will undoubtedly result in gross misuse by the Board to find successor liability where none should exist. The potential for industrial strife in service industries such as that of Petitioner has been increased to a degree yet unknown; the decision undermines the policy behind the successor doctrine.

As stated by Mr. Chief Justice Rehnquist in *Burns* at p. 1590-1591:

> " . . . The notion of a change in the 'ownership or corporate structure of an enterprise' connotes at the very least that there is continuity in the enterprise, as well as change; **and that continuity be at least in part on the employer's side of the equation, rather than only on that of the employees.** If we deal with the legitimate expectations of employees that the employer who agreed to the collective-bargaining contract perform it, we can require another employing entity to perform the contract ***only when he has succeeded to some of the tangible or intangible assets by the use of which the employees might have expected the first employer to have performed his contract with them.*** [emphasis added].
>
> "Phrased another way, the doctrine of successorship in the federal common law of labor relations accords to employees the same general protection against transfer of assets by an entity against which they have a claim as is accorded by other legal doctrines to nonlabor related claimants against the same entity. Nonlabor-related claimants in such transfer situations may

be protected not only by assumption agreements resulting from the self-interest of the contracting parties participating in a merger or sale of assets but also by state laws imposing upon the successor corporation of any merger the obligations of the merged corporation (*see* e.g. § 90 of the New York Stock Corporation Law (1951), cited in *Wiley*, supra), and by bulk sales acts found in numerous States. These latter are designed to give the nonlabor related creditor of the predecessor entity some claim, either as a matter of contract right against the successor, or as a matter of property right to charge the assets that pass from the predecessor to the successor. The implication of *Wiley* is that the federal common law of labor relations accords the same general type and degree of protection to employees claiming under a collective-bargaining contract."

Mr. Chief Justice Rehnquist further states in *Burns* at p. 1592:

"Burns acquired not a single asset, tangible or intangible, by negotiation or transfer from Wackenhut. It succeeded to the contractual rights and duties of the plant protection service contract with Lockheed, not by reason of Wackenhut's assignment or consent, but over Wackenhut's vigorous opposition. ***I think the only permissible conclusion is that Burns is not a successor to Wackenhut.***" [emphasis added].

II. THE COURT BELOW MISAPPLIED THIS COURT'S HOLDING IN *FALL RIVER DYEING & FINISHING CORP. V. NLRB*, 107 S. CT. 2225 (1987) TO IMPERMISSIBLY EXTEND THE SUCCESSOR EMPLOYER DOCTRINE AND PRODUCE GROSSLY UNJUST RESULTS

The Fifth Circuit Court's announced core inquiry of whether "the second corporation basically has continued the business and workforce of the first" is a misapplication of the law contained in *Fall River, supra;* it also is not the appropriate inquiry to determine whether the successor employer doctrine should apply to a situation where there has been a mere transfer of employees from one unrelated entity to another such as the facts in this case and conflicts with Mr. Chief Justice Rehnquist's decision in *Burns, supra.* The "second" corporation in *Fall River* was **a purchaser of the assets** of the first corporation. A subsequent employer's acquisition of assets from a previous employer is a primary policy consideration for the successor employer doctrine.

This case falls squarely within Mr. Chief Justice Rehnquist's analysis in *Burns*. The manner in which the Court below uses this Court's discussions of an employee's legitimate expectations as set forth in *Fall River,* not only conflicts with Mr. Chief Justice Rehnquist's analysis but is erroneous. The lower Court incorrectly focused ***first*** on *Fall River's* "employee viewpoint" criteria before considering this Court's instruction in *Fall River* that the Board is ***required*** to determine whether the new company "has acquired substantial assets of its predecessor and continued, without interruption or substantial changes, ***the predecessor's business operations***"

[emphasis added]. Contrary to this Court's analysis in *Fall River, supra,* the lower Court essentially ignores the fact that there had been no transfer of assets or other relationship between the prior and subsequent employer, thereby also failing to recognize "the employer's side of the equation" mentioned by Mr. Chief Justice Rehnquist in *Burns* with respect to enterprise continuity where no assets have been purchased and no other relationship exists between the subsequent employer and the employer who agreed to perform the obligations of a Collective Bargaining Agreement with its employees. Moreover, the lower Court erroneously found that HBS had continued ***Housekeeper's business operations*** where in fact HBS had commenced its own business operations and not continued those of another company.

The issue of whether the successor doctrine applies to situations involving subsequent employers who do not buy any assets of the previous employer and have no relationship with the previous employer is an issue upon which the Courts below have no direct guidance. This Court should settle this issue because of its critical importance to the area of labor law. The labor law successor employer doctrine should not apply to this case because there is no legal authority for such an extension of the doctrine. *Fall River's* requirement that the Board, in determining successorship, focus on whether the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial changes, the predecessor's business operations" supports Petitioner's argument that the issue of how the employees reasonably view their employment situation is

not critical until the Board makes the initial determination of the actual relationship between the two enterprises and finds that there is a "substantial continuity" between the two entities based on the above criteria.

If *Fall River's* required initial inquiry had been made in this case, clearly HBS could not be found to be a successor employer because there was no sale or transfer of assets or ownership and HBS did not continue the business of Housekeepers, an entirely different company. The issue of how the employees viewed their employment situation, **[which was the primary consideration of the Board, the ALJ and the Court below]**, simply does not become a primary issue in this case if *Fall River* is properly applied.

The policies underlying successorship necessarily require a sale of assets or transfer of ownership between two employing entities. The Chief Justice has decided this issue; *see NLRB v. Burns Int'l Security Servs., Inc.*, 92 S.Ct. at 1588-1591 (1972).

The NLRB did not address the questions presented here in the Court below but instead argued that the issue was one of *sufficiency of the evidence* to support the decision of the ALJ that HBS was a successor employer. Significantly *Fall River* involves application of the labor law successor employer doctrine in a case ***involving the transfer of assets of a business*** by the previous employer to a subsequent one; the case *did not* address applicability of the successor employer doctrine if the subsequent employer had not purchased any assets of the predecessor and had no relationship with the predecessor of

any nature. *Fall River* did not discuss the issue of applicability of the successor employer doctrine where there is only a transfer of employees from one unrelated employer to another.

III. BECAUSE OF THE IMPORTANCE OF THE ISSUE OF SUCCESSORSHIP IN LABOR LAW AND THIS COURT'S RESPONSIBILITY TO ASSURE THAT THE BOARD APPLIES RATIONAL RULES IN DETERMINING SUCCESSOR LIABILITY, THIS COURT SHOULD GRANT THIS PETITION AND PROVIDE GUIDANCE TO THE BOARD AND THE COURTS BELOW ON THIS UNSETTLED ISSUE

This Court should grant this petition and settle the issues presented to assure that the Board and the courts below apply rational rules in determining successor liability. The determination must be made in a manner which will serve the principles and policies underlying the successor doctrine rather than impermissibly expanding the scope of successor liability to a point where the result is one of gross injustice and unsound legal precedent.

CONCLUSION

The Court below has misapplied the law to the facts of this case resulting in an expanded, unwarranted and unsupported gross misinterpretation of the labor law doctrine of successor employer. The decision of the Court below establishes unsound legal precedent and the issues presented here should be settled by this Court. The lower

Court's decision is contrary to the decision of Mr. Chief Justice Rehnquist on identical questions as those presented by Petitioner to this Court.

Because the Court below misapplied this Court's prior holdings in *Fall River* to support its impermissible extension of the successor employer doctrine, the decision also conflicts with prior holdings of this Court.

Respectfully submitted,

VEDA MOORE
(Counsel of Record)
THOMAS W. MOORE
MOORE AND MOORE
10370 Richmond Avenue
Suite 720
Houston, Texas 77042
(713) 977-0964
Telecopier: (713) 785-6829

Attorneys for Petitioner

APPENDICES

APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

and

Unlicensed Division of District No. 1. MEBA/NMU, AFL-CIO, Intervenor.

v.

HOUSTON BUILDING SERVICE, INC., Respondent.

No. 90-4439.

United States Court of Appeals, Fifth Circuit.

July 2, 1991.

On Application for Enforcement of an Order of the National Labor Relations Board.

Before BROWN, KING and GARWOOD, Circuit Judges.

KING, Circuit Judge:

Houston Building Service, Inc. (Houston Building), was awarded a General Services Administration (GSA) contract for janitorial services at three federal buildings. Commencing performance of the contract, Houston Building continued to employ members of the former company's union. The National Labor Relations Board (NLRB) upheld an Administrative Law Judge's (ALJ) finding that Houston Building was a successor employer and that it consequently had violated the National Labor Relations Act (NLRA) by refusing to bargain with the

union and by changing the conditions of employment. The NLRB now seeks enforcement of its bargaining order.

I.

The Unlicensed Division of District No. 1, MEBA/NMU, AFL-CIO, has been the collective bargaining representative for approximately 30 custodians who supply janitorial services at three federal buildings in Austin, Texas. Between 1980 and 1987, five successive employers performed this GSA contract, and each maintained a collective bargaining relationship with the union. Each successive employer hired the old employees, after having them complete new job applications and union authorization cards.

Housekeepers Maintenance Service and Supply, Inc., was the last employer to hold the GSA contract before Houston Building. Housekeepers recognized the union and signed a collective bargaining agreement that was to run into 1989. In late 1987, however, Houston Building won the GSA contract from Housekeepers.

Breaking from traditional precedent, Houston Building decided to hire new employees. The GSA contract, however, provided that all employees needed security clearances. Because the security procedures would take too long to obtain, Houston Building decided to hire former Housekeepers employees. On December 1, 1987, all 30 rank and file Housekeepers employees, and three Housekeepers supervisors reported to work.

On December 9, 1987, Houston Building received a letter asking that it recognize the union, but Houston

Building refused to bargain with the union. Houston Building instead mailed a letter to a GSA representative, stating that Houston Building intended to subcontract its custodial work.

On December 9th, Houston Building terminated 11 of the holdover workers. Over the next few weeks, Houston Building terminated several more workers, and gradually replaced them with new employees who had passed security clearance procedures. Finally, on January 4th, Houston Building determined that it was unlikely that any more new employees would clear security, and converted the remaining holdover employees to permanent status. At no time did Houston Building comply with the old collective bargaining agreement, and it did not deduct pension and health and welfare fund contributions from the employee wages, as required under the contract.

After hearings, the ALJ determined that Houston Building was a successor employer to Housekeepers, and that it therefore had violated the NLRA by refusing to recognize and bargain with the union, by terminating and/or reducing the hours of employee holdovers, and by unilaterally changing the working conditions. The National Labor Relations Board affirmed, and ordered Houston Building to recognize and bargain with the union. The Board now asks us to enforce its order.

II.

The question of whether Houston Building is Housekeepers's successor "is primarily factual in nature and is based upon the totality of the circumstances of a given

situation." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S.Ct. 2225, 2236, 96 L.Ed.2d 22 (1987). We upheld the Board's findings, so long as they are supported by substantial evidence. *Universal Camera Corp v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

In order to support the Board's findings that Houston Building is Housekeepers's successor, there must be " 'substantial continuity' between the enterprises." *Fall River*, 107 S.Ct. at 2236 (citing *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 92 S.Ct. 1571, 1578 n. 4, 32 L.Ed.2d 61 (1972)).

> Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Id.

Of all these factors, one of the most significant is the overlap in workforces between the two entities. Thus, once a representative workforce is achieved, if "a majority of the successor's employees had been employed by its predecessor, then the successor has an obligation to bargain with the union that represented those employees," assuming that the union has made a bargaining demand. *Id.* 107 S.Ct. at 2238; *see NLRB v. Fabsteel Co. of La.*, 587 F.2d 689, 694-95 (5th Cir.), *cert. denied*, 442 U.S. 943, 99 S.Ct. 2887, 61 L.Ed.2d 313 (1979).

The union did indeed present Houston Building with a bargaining demand. At that time, Houston Building's workers all were former Housekeepers workers who were performing identical work to that which they had done under Housekeepers. The working conditions, production process, and customers remained unchanged.

We evaluate whether Houston Building was a successor from the viewpoint of the employee at the time that a "substantial and representative complement" of the new employer's workforce came onto the job.[1] Considering that this particular bargaining unit worked under five owners in seven years, and that after each change in ownership the union structure had continued unabated, any employee would have assumed quite reasonably that when Houston Building hired virtually its entire workforce from Housekeepers's ranks, it intended to continue the union structure.

Furthermore, much of this case is of Houston Building's own making. When it took over the GSA contract, the employees were given job applications and union authorization cards, which was a practice consistent with previous transitions. Despite the possibility of these actions misleading the employees, Houston Building never told the holdovers that their jobs only were short-term. Houston Building thus did nothing to combat the impression that any reasonable employee would have in

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[1] *Fall River*, 107 S.Ct. at 2236. Because of this viewpoint, we must reject as irrelevant Houston Building's contention that this case should be decided differently simply because it was forced to use the old workers until the new workers received security clearances.

these circumstances that the "new" job merely was a continuation of the old. While Houston Building contends that it is unfair for the NLRB to force it to deal with the union, it likely could have avoided this situation by simply telling the holdovers that they were only temporary.

"If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest," which is what the NLRA is intended to prevent. *Fall River,* 107 S.Ct. at 2236. This situation arises today. Houston Building chose to rehire a workforce that had grown accustomed to new owners adopting the collective bargaining arrangements of former employers. Houston Building not only rehired these same workers, but did so in a manner which would indicate that the same practice was continuing. Because the "operations . . . remain[ed] essentially the same after the transfer of ownership," *International Union of Elec., Radio and Mach. Workers v. NLRB,* 604 F.2d 689, 694 (D.C.Cir.1979), we find that the decision of the Board is supported by substantial evidence. We therefore GRANT the Board's Application for Enforcement of its Order.[2]

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[2] Houston Building claims that because it did not acquire Housekeepers' assets, we cannot hold that there was any substantial business continuity. Transfer of ownership of assets, however, is only one factor we consider. Our core inquiry remains whether, under the totality of circumstances presented, the second corporation basically has continued the business and workforce of the first.

APPENDIX B

SCD

296 NLRB No. 101

D – 9934
Austin, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOUSTON BUILDING SERVICE, INC.

and Case 23 – CA – 10872

UNLICENSED DIVISION OF DISTRICT NUMBER 1, MEBA/NMU, AFL-CIO

DECISION AND ORDER

On December 16, 1988, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions[1] and a brief in opposition to the Respondent's exceptions.

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[1] In its cross-exceptions, the Charging Party requests, inter alia, that the Board amend the judge's recommended reinstatement and make-whole remedy to include employees Tommy Lee Clark and Ophelia R. Milicia, who it asserts were discharged on January 4, 1988, and "all other employees whom [the Respondent] laid off or terminated without providing the Union an opportunity to bargain thereon, with full back wages, fringe benefits and seniority." We find the cross-exceptions without merit. In this regard, we note that the complaint alleged unlawful layoffs occurring about December 11, 1987, and that the General Counsel did not amend the complaint to allege as unlawful any subsequent layoffs. Furthermore, the matter of subsequent layoffs was not fully litigated.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

---

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the employees of Housekeepers Maintenance Service and Supply, Inc., whom the Respondent hired as of December 1, 1987, were the Respondent's employees for the purpose of determining successorship notwithstanding the Respondent's contention that they were temporary employees. As the judge found, these employees did not know that their employment with the Respondent was temporary. In this regard, we note the Respondent's predecessors' practice of hiring the prior contractor's employees as permanent employees, and the fact that no one in the Respondent's management told the unit employees that they were temporary. Although, as the Respondent contends, Contract Manager Eugene Darby testified that on November 30, 1987, he had a meeting with supervisors and leadpersons in which he told them "that they [the former Housekeepers employees] were going to be replaced with a new crew," the judge instead credited the testimony of leadperson Joanne Johnson as to that conversation. Johnson testified that Darby told her and other Housekeepers employees that a new company would be coming in and would be brining in "some" of its own employees.

(Continued on following page)

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Houston Building Service, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 29, 1989

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

(Continued from previous page)

Johnson also testified that Darby did not tell Housekeepers employees that they were temporary or that they were subcontractors or that they would eventually be laid off. In this regard, there is no credited evidence in the record that any of the supervisors or any member of the Respondent's management told the unit employees that they were temporary, or that any member of management was instructed to so inform unit employees before December 1.

JD(ATL) – 70 – 88
Austin, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HOUSTON BUILDING SERVICE, INC.

and Case 23-CA-10872

UNLICENSED DIVISION OF DISTRICT NUMBER 1, MEBA/NMU, AFL-CIO[1]

J. O. Dodson, Esq., for General Counsel.

Thomas W. Moore, Esq., (Moore and Moore), Houston, TX, for the Company.

Sidney H. Kalban, Esq., (Phillips, Cappiello, Kalban, Hofman and Katz, P.C.), New York, NY, and H. Ralph Smith, Int'l. Rep., Galveston, TX, for the Union

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. This case was tried before me in Austin, Texas, on

[1] The name of the Union appears as amended (without opposition) at the trial herein.

September 8 and 9, 1988, pursuant to a Complaint and Notice of Hearing (hereinafter complaint) issued by the Regional Director for Region 16[2] of the National Labor Relations Board (hereinafter the Board) on June 27, 1988. The complaint is based upon a charge filed on December 30, 1987,[3] by the Unlicensed Division of District Number 1, MEBA/NMU, AFL-CIO (hereinafter Union). The complaint alleges Houston Building Service, Inc. (hereinafter HBS or Company) has engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (hereinafter the Act).

The issues generally summarized are: (1) whether HBS is a successor under the Act to Housekeepers Maintenance Service and Supply, Inc. (hereinafter Housekeepers), thereby having an obligation under the Act to recognize and bargain with the Union which had been the collective bargaining representative of the employees of Housekeepers; (2) whether the employees of Housekeepers that were hired by HBS were hired as temporary employees; and, (3) whether those same employees referred to in issue 2 above were independent contractors instead of employees of HBS.

All parties were afforded full opportunity to examine and cross-examine witnesses, to argue orally, and to submit briefs. Briefs which have been carefully considered were submitted by Counsel for the General Counsel, the Union, and HBS.

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[2] What was originally Region 23 of the Board is currently a subdivision of Region 16.

[3] All dates herein are 1987 unless otherwise indicated.

Based upon the entire record, including my observation of the demeanor of the witnesses, I conclude below, after examining the relevant evidence and applicable legal principles, that HBS is the successor of Housekeepers and is therefore obligated to recognize and bargain with the Union and further that the employees of Housekeepers that were hired by HBS were not hired as temporary employees nor were they independent contractors rather than employees of HBS.

Findings of Fact

I. Jurisdiction

HBS is a Texas corporation with an office and principal place of business in Houston, Texas, where it is engaged in the business of providing janitorial services. At all times material herein, HBS has provided janitorial services for the General Services Administration (hereinafter GSA) which manages the Veteran's Administration Data Processing Center, U.S. Treasury Disbursing Center, and the Veteran's/Internal Revenue Service Warehouse in Austin, Texas (hereinafter the Austin Federal Buildings). During the 12-month period preceding the issuance of the complaint herein, a representative period, HBS, in the course and conduct of its business operations, provided services valued in excess of $50,000 for GSA, a division of the United States Government which is directly involved in interstate commerce. The complaint alleges, the parties admit, and I find, that HBS is, and at all times material herein has been, an employer engaged in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The complaint alleges, the parties admit, and I find, the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

Generally speaking, the background and essential facts are not disputed. I have, to the extent that it is practical, set forth the following undisputed or credited facts in chronological order. At places, I have identified the witness or witnesses who provided certain specific facts that are set forth. Although the facts set forth are not all inclusive, all evidence and arguments of counsels about the evidence has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this Decision may appear to contradict my finding of facts, I have not disregarded such evidence but rather have rejected it as not relevant, surplusage, lacking in probative weight, or incredible.

HBS and its various predecessors have for years provided janitorial services for GSA which manages the Austin Federal Buildings.

In 1980, the Union organized the custodial service employees employed at the Austin Federal Buildings.[4]

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[4] The appropriate unit includes all custodial service employees employed at the Austin Federal Buildings excluding all other employees and supervisors as defined in the Act.

The contractor/employer at that time (1980) was Nash Janitorial Services, Inc. (hereinafter Nash). Approximately 30 employees were in the unit in 1980. Nash recognized the Union as the collective bargaining representative of its employees after an independent certified public accountant firm, LeMasters & Daniels of Moses Lake, Washington, certified that 23 of its employees had signed union authorization cards. The Union and Nash executed a collective-bargaining agreement in 1980. Thereafter, until the advent of HBS, the Union has had a collective-bargaining agreement with each of the contractors that obtained the janitorial services contract from GSA for the Austin Federal Buildings.

From 1980 forward, the work force has remained at approximately 30. The employees have performed essentially the same work from 1980 until the present, namely, generally cleaning the buildings, stripping and waxing floors, vacuuming carpets, washing woodwork, cleaning, and making the computer rooms dust free and maintaining the grounds by cutting the grass and trimming the shrubbery. Some levels of cleaning are performed daily while other levels are performed weekly, quarterly, or annually on a staggered basis.[5]

From 1980 forward, approximately five different contractors have been awarded the GSA janitorial services contract for the Austin Federal Buildings. Each of the

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[5] I find insignificant and shall not further address the fact that GSA may have, for approximately 90 days in the fall of 1987, stopped requiring certain cleaning to be performed. Such did not change the overall nature of the duties of the employees and does not impact on the issues herein.

contractors that preceded HBS hired the supervisory staff and employees of their predecessor.

Housekeepers had the GSA contract to provide janitorial services for the Austin Federal Buildings immediately prior to HBS being awarded the contract. On October 1, 1985, Housekeepers signed a "Memorandum of Acceptance" with the Union in which it accepted the terms and conditions of an agreement then in effect between the Union and a prior contractor, namely, Rite Way Services of San Antonio, Inc. Thereafter, the Union and Housekeepers entered into a new collective-bargaining agreement covering the custodial service employees at the Austin Federal Buildings effective from August 1, 1986 until October 31, 1989.

At some point in 1987, GSA solicited bids for the custodial work at the Austin Federal Buildings. Union Representative H. Ralph Smith (hereinafter Union Representative Smith c. Smith) first learned at about mid year that the cleaning contract had been put up for bids. Smith testified he received a telephone call on November 19 from a Mijor Thomas (hereinafter Contract Coordinator Thomas or Thomas) who identified himself to Smith as a "friendly voice" working for HBS.[6] Thomas told Smith he felt reasonably sure HBS would be awarded the GSA custodial services contract for the Austin Federal Buildings. HBS Contract Coordinator Thomas told Smith, "he would like very much to review the collective-bargaining agreement . . . applicable to that contract and the

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[6] The parties stipulated that HBS Contract Coordinator Thomas, at all times material herein, was a supervisor and agent of HBS within the meaning of the Act.

employees working thereon." Thomas asked Smith how many employees were working under the contract at that time. Smith told Thomas there were approximately 30 unit employees. Thomas asked Smith if he had an employee seniority list, and Smith told him he did. On November 19, Smith express mailed to Thomas (1) a copy of the collective-bargaining agreement the Union had with Housekeepers which was effective until October 31, 1989, (2) a Memorandum of Agreement amending the collective-bargaining agreement, and (3) a copy of the employees seniority list.

HBS President Jason Yoo (hereinafter President Yoo or Yoo) testified he met with Housekeepers Contract Manager Eugene Darby (hereinafter Contract Manager Darby or Darby)[7] on November 16, to discuss retaining him as contract manager after HBS took over the GSA custodial services contract for the Austin Federal Buildings on December 1. Yoo and Darby discussed how HBS would conduct business from December 1 forward. Yoo testified he told Darby that HBS wanted to bring in its own work crews. Yoo testified Darby told him it could take up to a month to obtain security clearances for any new employees.[8] Yoo testified he was not convinced it would take that long because representatives of GSA had

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[7] Darby had been contract manager for Housekeepers and as of the trial herein continued to occupy that position for HBS.

[8] It is undisputed that all janitorial employees at the Austin Federal Buildings must have security clearances before they can enter the buildings. Employees that work in some areas such as computer rooms, must have higher security clearance than those working in other areas.

told him it would only take approximately one week for new employees to obtain security clearances.

Employee Clifton Bailey, (hereinafter union steward Bailey or Bailey), who has worked for contractors at the Austin Federal Buildings since 1979 and has served as a union steward since approximately mid 1986 testified that on November 23, his immediate supervisor, Brian Edwards (hereinafter Supervisor Edwards or Edwards),[9] gave the employees on his shift employment applications which called for the applicant's personal, work, military, and educational histories. Edwards also gave the employees under his supervision blank union authorization cards which were to be filled out. Edwards told the employees to fill out both sets of papers and return them by the next day, or they would be out of a job. When union steward Bailey asked Edwards what employer's name to put on the application, Edwards told him HBS.[10]

HBS President Yoo testified certain new employees were hired by HBS on November 25, to work at the Austin Federal Buildings. Those hired on that date were hired subject to their obtaining security clearances from the government. Some of those, to whom commitments

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[9] The parties stipulated that Edwards is, and at all times material herein has been, a supervisor and agent of HBS within the meaning of the Act. It is undisputed that Edwards held the same position with Housekeepers that he currently holds with HBS.

[10] Contract Manager Darby stated he gave Supervisor Edwards job applications and union cards for the employees under his supervision, however, he was not certain as to the exact date but said it could have been as early as October.

were made on that date, never actually received a security clearance from the government and were never employed by HBS.[11]

On November 30, Contract Manager Darby told 7-year leadperson Joanne Johnson (hereinafter leadperson Johnson or Johnson)[12] and other Housekeepers employees that were "hanging around the office" that a new company, HBS, would be coming in and would be bringing "some" of its own employees. Darby did not tell Housekeepers' employees they would be temporary employees or that they would be considered subcontractors or that they would eventually be laid off.

HBS President Yoo testified he instructed Contract Manager Darby on November 30 to put Housekeepers employees to work for HBS on December 1, on a temporary basis until HBS could obtain security clearances for its own employees. Yoo testified he had Darby utilize Housekeepers' employees on that date because "he panicked" in that if someone did not perform the job, HBS would be in "default" on the first day of its custodial services contract with GSA.[13]

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[11] G.C. Exh. 9(a) reflects 18 individuals were tentatively hired on November 25, subject to security clearances being obtained.

[12] I am persuaded the evidence does not establish that Johnson or her counterpart Larry Galloway were supervisors within the meaning of the Act. Even if I concluded they were supervisors within the meaning of the Act, it would not alter the outcome herein.

[13] As will be discussed more fully elsewhere in this Decision, Contract Manager Darby did not tell the employees on

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The employees that had worked for Housekeepers reported, as had been their past practice, for work on December 1 with the new contractor HBS and worked a full shift on that date. No one from HBS instructed them not to work on that date. The work force consisted of 33 persons on December 1, all of whom had been associated with Housekeepers.[14] Thirty of the 33 had been unit employees and 3 had been supervisors, namely, Contract Manager Darby and Supervisors Edwards and John Johnson. On December 1, the employees performed the same work they had previously performed for Housekeepers with the same supervisors they had at Housekeepers.

Leadperson Johnson testified Contract Manager Darby gave her "Employment Application, Personal History" forms along with union cards on either December 2 or 3 and told her to fill one out for herself and have her crew do likewise and return them to him on that date.[15]

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December 1, they would be working as temporary employees or on a temporary basis.

[14] Darby testified Housekeepers went out on November 30, and HBS came in on December 1. He acknowledged he did not tell the employees that had previously been employed by Housekeepers not to work on December 1 because in the past whenever one contractor left the crews had always been hired by the new contractor inasmuch as that had been standard operating procedure.

[15] Although he could not be certain as to the date on which he did so, Contract Manager Darby testified he provided Housekeepers employees with employment application forms as well as union cards and that he questioned the supervisors about them until he received the completed papers that he needed back from Housekeepers employees.

HBS President Yoo testified he learned from talking with Contract Manager Darby "in the neighborhood of" December 2 or 3, that Darby had not indicated anything to Housekeepers' employees on or before December 1, that they were "temporary" workers to be utilized only until HBS could get its own crews cleared through security. Yoo testified Darby wanted something in writing on the employees' status so he thereafter drafted a letter which he signed on December 8 and subsequently mailed to Darby.[16]

On December 3, HBS commenced to utilize one individual as a supervisor who had not previously worked for Housekeepers. On December 4, the new supervisor's wife and one other employee who had not previously worked for Housekeepers commenced working for HBS. On December 7, one additional new employee started working for HBS.[17]

On December 7, the work hours for the unit employees were changed from 4:30 – 8:30 p.m. to 5 – 9 p.m. Also on December 7, Contract Coordinator Thomas telephoned Union Representative Smith and inquired whether HBS would be liable for the severance allowances called for in the wage determinations issued by the U.S. Government which determinations were

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[16] Yoo's letter, which is set forth elsewhere in this Decision, makes no mention of the fact that the employees that had previously worked for Housekeepers were or would be considered to be temporary workers.

[17] As of December 7, HBS employed 32 rank and file employees (30 of which had worked for Housekeepers) and 5 supervisors (3 of which had worked for Housekeepers [sic].

included in the collective-bargaining agreement between Housekeepers and the Union. Smith explained to Thomas the severance allowances were legal fringe benefits and HBS would be liable for them. Smith then told Thomas he had heard rumors the unit employees would be replaced and asked if such rumors were true. Contract Coordinator Thomas told Union Representative Smith the unit employees were not employed by HBS. Smith told Thomas the unit employees were performing the work. Thomas admitted they were but stated they had never been hired by HBS. Smith asked Thomas if he did not think the federal government would look at that in a different light. Thomas told Smith that was not up to him that it was up to HBS's lawyers. Thomas then told Smith there were certain documents the Union had not sent to HBS. Smith so acknowledged and told Thomas it had been because of his absences from the city and he assured Thomas he would immediately send the additional documents to HBS. In a letter dated December 7, mailed December 8, and received by HBS on December 9, the Union (1) demanded recognition, (2) enclosed a copy of the collective-bargaining agreement between Housekeepers and the Union, (3) provided HBS a Memorandum of Acceptance for the collective-bargaining agreement, and (4) provided copies of 29 union membership applications/dues deduction cards from unit employees.[18]

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[18] HBS stipulated it received the Union's demand letter on December 9. HBS President Yoo testified he received the other items in the letter except there were no copies of the unit employees' union membership application/dues deduction cards with the letter. I credit Union Representative Smith's

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On December 9, when as usual, the unit employees reported for work they were instructed to execute IRS W-9 forms.[19] Leadperson Johnson testified Contract Manager Darby told her that if she and the members of her crew did not execute the W-9 forms, they would not be paid. Johnson testified Darby did not mention that the employees would be considered to be independent contractors and she stated their duties did not change after they signed the IRS W-9 forms. Union steward Bailey testified Contract Manager Darby told the group of approximately 15 employees that he was with on December 9 that if they did not sign the IRS W-9 forms, they would not be permitted to enter the buildings.[20] Also on December 9, the employees were shown a copy of HBS President Yoo's letter to Contract Manager Darby. Yoo's letter, which was dated December 8, reads as follows:

> Please inform all individuals presently performing work on the contract of our intention to make those individuals who perform the duties pursuant to the cleaning requirements of this contract subcontractors and not employees of Houston Building Service, Inc. As subcontractors of HBS, all persons who perform the cleaning requirements will receive compensation in

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testimony that he mailed the cards in question. The letter that was received clearly makes reference to the cards and such cards were received in evidence at the trial herein.

[19] An IRS W-9 is a "Payer's Request for Taxpayer Identification Number and Certification" form.

[20] Bailey testified that federal security personnel also told them they could not get their identification badges to enter the buildings unless they signed the IRS W-9 forms as requested by HBS.

> the form of a contract amount based on the prevailing Department of Labor Wage Determination and the total labor hours contributed.
>
> All subcontractors will be required to submit to the company a completed form W-9 Payer's Request for Taxpayer Number and Certification.

On December 9, the employees were only allowed to work 1 hour instead of their normal 4-hour shift. As of December 9, HBS employed 37 persons, 32 rank and file employees and 5 supervisors. Thirty of the 32 unit employees, and 3 of the 5 supervisors had previously worked for Housekeepers.

HBS hired four new employees, both on December 10 and 11. None of those hired on those 2 days had previously worked for Housekeepers.

At the end of the work shift on December 11, HBS terminated 11 employees that had previously worked for Housekeepers.[21]

As of December 19, HBS employed 16 unit employees and 2 supervisors that had previously worked for Housekeepers[22] and 11 rank and file employees and 2

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[21] The 11 terminated were: Joyce Marie Altum, Clifton Bailey, Kennie Grady, DuTriem Kim, Maria Menchacha, Jessie Irene Meyer, Rita C. Morales, Benny Henry Pamplin, Willie Belle Piper, Frances Cortez Ramirez, and Onnie Lee Walker.

[22] The 16 unit employees were: Tommy Clark, Clemente Cortez, Charles DeShay, Howard Franklin, Louis Figueroa, Larry Galloway, Milton Henderson Joeann [Joanne] Johnson,

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supervisors that had not.[23]

It is undisputed that HBS never bargained with the Union about (1) the reduction of hours of work for the employees on December 9, (2) the termination of prior Housekeepers' employees on and after December 11, (3) its failure at any time to make contributions to the pension fund, annual benefit fund and health and welfare funds, or (4) its efforts to change its employees' status to that of independent contractors.

B. Positions Taken by the Parties

I shall briefly summarize the positions taken by the parties. All positions taken and arguments advanced in support thereof have been considered; however, this summary is not intended to be all inclusive.

HBS asserts that after it was awarded the janitorial services contract for the Austin Federal Buildings, it decided to keep its predecessor's contract manager and supervisors but to replace all unit employees with its own work crews. HBS contends it made that decision in September or October. HBS asserts that because it was unable to obtain timely security clearances for its own workers,

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Candelario Martinez, Ophelia Melicia, Helen North, Mary Ann Pesina, Anthony Rodriguez, Gloria Rodriguez, Lonnie Walker, and Booker Washington. The two supervisors were Contract Manager Darby and Supervisor Edwards.

[23] The 11 rank and file employees were: Yi S. Braswell, Yook Brown, Chul H. Cho, Sam H. Cho, Kwang C. Chang, Su Y Cruz, Young Lee, Sun C. Martin, Vela Maximo, Ok S. Owens, and Ok H. Wingo. The two supervisors were Jo A. Park and Yong S. Park.

it was faced with either utilizing its predecessor's employees who had security clearances, or defaulting on its contract the very first day it assumed its contractual duties. Faced with this choice, HBS asserts it only utilized its predecessor's employees as temporary workers or as independent contractors until the end of December when more of its intended work crews received security clearances, thus, stabilizing its intended work force. HBS contends that by the time its intended work force stabilized at the end of December, the Union did not represent a majority of its employees and as such it had no obligation to bargain with the Union. In this regard, HBS strongly urges it is not a successor employer but nevertheless asserts one of the rules developed by the Board and approved by the Supreme Court in the successorship context – the substantial and representative complement rule – is dispositive of the case sub judice. Simply stated, HBS contends it did not have a "substantial and representative complement" of its intended work force until on or about December 31, and urges it is at that date only that a proper determination can be made as to whether a majority of its employees were former employees of its predecessor. Since HBS contends a majority of its work force on that date was not made up of employees of its predecessor, it asserts no bargaining obligation was ever legally triggered into being.

Counsel for the General Counsel and Union counsel contend that when HBS commenced operation on December 1, it had a full complement of employees all of whom had previously worked for the predecessor employer Housekeepers. They assert the employees worked as janitors at the same Austin Federal Buildings as they had

when employed by the predecessor under the same conditions without any change in the nature of their services and under the same supervision they had at the predecessor. Counsel for the General Counsel and Union counsel assert there was substantial continuity between the enterprises such that HBS is the legal successor of Housekeepers. They further contend that as of the date (December 9) the Union made a demand to bargain of HBS, it still represented a majority of HBS's nonsupervisory employees and continued to represent a majority of those employees as late as December 19 which was after HBS had laid off certain employees that had previously worked for Housekeepers. Thus, they assert that at all relevant times herein, the Union, as bargaining representative of the predecessor's employees retained by HBS, enjoyed a clear majority status among the nonsupervisory employees.

Counsel for the General Counsel and Union counsel contend the employees of the predecessor hired by HBS had every expectation of continued employment with HBS and as such were not temporary employees. In this regard, they point to the fact the employees were not told when they were hired that their employment would be temporary. Furthermore, Counsel for the General Counsel and Union counsel assert that over the course of periodic changes in the identity of the cleaning contractors, it had been standard procedure for the incoming contractor to hire its predecessor's work force. Additionally, they contend HBS never had a definite (or for that matter indefinite) date on which the predecessor's employees would be terminated. Thus, they urge the predecessor's

employees cannot be found to be temporary employees of HBS.

Counsel for the General Counsel and Union counsel also urge that the employees of the predecessor were not independent contractors with HBS even though HBS attempted to convert them to that status. They argue HBS retained all aspects of managerial control over the employees it had exercised prior to attempting to convert them to independent contractor status and that the level of entrepreneurial risk for the employees remained either negligible or nonexistent at all times. Accordingly, Counsel for the General Counsel and Union counsel urge that HBS be ordered to (1) recognize and bargain with the Union, (2) reinstate and make whole the discharged employees, and (3) make the necessary contributions on the employees' behalf to the pension fund, annual benefit fund, and the health and welfare funds.

C. Discussion, Analysis, and Conclusions

The Supreme Court in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972) approved the Board's and Court's approach with respect to determining whether a new company is indeed the successor of its predecessor. The approved approached [sic] is primarily factual in nature and is based upon a consideration of the totality of the circumstances of a given situation. In *Fall River Dyeing & Finishing Corporation v. NLRB*, 107 S.Ct. 2225 (1987), the Supreme Court observed that this approach requires the Board to focus on whether the new company has acquired substantial assets of its predecessor and continued without interruption or substantial

change the predecessor's business operations. In short, the Supreme Court noted the focus is on whether there is "substantial continuity" between the enterprises. In determining whether there is "substantial continuity" between the enterprises, the Board's approach has been to consider the following factors: (1) whether there has been a continuation of the same business operations, (2) whether the new employer utilizes the same plant facility as the previous employer, (3) whether the new employer utilizes the same or substantially the same work force, (4) whether the same jobs exist under the same working conditions, (5) whether the new employer utilizes the same or substantially the same supervisors, (6) whether the new employer utilizes the same machinery, equipment, and/or methods of production, (7) whether the new employer manufactures the same product, offers the same services, and/or has the same customers and (8) whether there has been a hiatus between the previous and new employer's operations. None of these factors is dispositive. *NLRB v. Band-Age, Inc.*, 534 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 921 (1976). These factors are to be examined from the employees' perspective. In *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135 (3d Cir. 1976), the Court observed "this 'employee viewpoint' derives from the concept that the only reason to limit a successor employer's ability to reorganize his labor relations is to offer the employees some protection from sudden change in the employment relationship." The Court also noted the factors related to successor status must be carefully examined to ascertain "whether the changes in the nature of the employment relationships

are sufficiently substantial to vitiate the employees' original choice of bargaining representative." Where there is substantial continuity and the new employer is found to be a successor, the presumption of majority status by the union under the predecessor, such as established by a collective-bargaining agreement, is not affected by a change in employers. The bargaining requirements of a successor do not, however, bind it to the predecessor's collective-bargaining agreement with the union. The Supreme Court noted in *Fall River Dyeing*, supra, that the applicability of the *Burns*, supra, successor employer doctrine rested, to a substantial extent, in the hands of the successor. The Supreme Court stated "If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of Section 8(a)(5) is activated."

Applying these well settled criteria and principles to the totality of the circumstances herein, I conclude HBS is a successor employer. I am persuaded the employees herein viewed the operations of HBS from December 1 forward as nothing more than a continuation of their previous employment. As Contract Manager Darby stated, it had been standard operating procedure for each new employer to utilize its predecessor's employees to perform the same duties and functions the employees had previously performed. On December 1 when HBS became the GSA selected contractor for the Austin Federal Buildings, its operations and functions were the same as its predecessor. On that date, and at all relevant times thereafter, HBS was responsible, as had been its immediate and other predecessor's, for generally cleaning the

buildings, stripping and waxing floors, vacuuming carpets, washing wood work, cleaning and making computer rooms dust free and maintaining the surrounding grounds by cutting the grass and trimming the shrubbery. The three buildings HBS was responsible for cleaning were the same buildings that had been cleaned by its predecessor. On December 1, HBS utilized the exact same work force performing the same jobs under the same working conditions and with the same supervisors that had been utilized by its predecessor. HBS's 33-person work force on that date consisted of 30 unit employees and three supervisors all of whom had worked for its predecessor.

There was no hiatus involved herein in that the predecessor completed its contractual cleaning duties on November 30, and HBS commenced to perform the same functions on December 1, and has continued to perform those functions since that time.

The record shows that the majority of HBS's employees at the date it commenced operation and continuing at least through December 19, were former employees of the predecessor. On December 3, the 34-person work force consisted of 30 unit employees and 3 supervisors who had worked for the predecessor and 1 new supervisor who had not. The new supervisor's wife along with one additional unit employee that had not worked for the predecessor were added to the work force on December 4. An additional unit employee that had not worked for the predecessor was added to the work force on December 7. As of December 9, NBS's work force numbered 37 with 32 unit employees and 5 supervisors. Thirty of the 32 unit employees and three of the five

supervisors had previously worked for the predecessor. As of December 19, (HBS laid off certain employees on December 11), the work force numbered 31 – 27 unit employees and 4 supervisors, 16 of the unit employees and 2 of the 4 supervisors had worked for the predecessor.

The significant time for determining what percentage of the new employer's employees was former employees of a predecessor is when a demand for bargaining has been made and a "substantial and representative complement" of the new employer's work force is on the job. *Fall River Dyeing*, supra. Applying this rule to the case sub judice, it is clear HBS was obligated to bargain with the Union on and after December 9, which was the date the Union made its demand for recognition and negotiations. On that date, HBS employed a full work force with all job classifications filled. As reflected above, it is clear a majority of HBS's employees were former employees of the predecessor not only on December 9 but from the time HBS began operations at the Austin Federal Buildings until at least December 19.

I reject HBS's contention that the employees it hired who had been employees of the predecessor were either temporary employees or independent contractors. First, the predecessor's employees were given applications for employment with HBS and instructed to fill them out and return them ultimately to HBS Contract Manager Darby. Consistent with past practice and standard operating procedures, the predecessor's employees were allowed to work as usual on December 1 (when HBS took over the contract) and thereafter. The predecessor's employees were not told at the time they made application for

employment with, nor when they commenced working for, HBS that their employment would be for a given period or that it would otherwise be of a temporary nature. An employee that works a regular schedule and performs duties that are a regular part of an employer's operations is, absent other factors, not a temporary employee under Board criteria. Generally speaking, an employee is deemed temporary and excluded from a unit if the employee has no expectation of continued employment with an employer and/or if there is a contemplated date for termination of the employee. See, e.g. *Wayside Realty Group, Inc.*, 281 NLRB No. 45 at fn. 2 (1986) and *J. P. Sand and Gravel Co.*, 222 NLRB 83, 84 at fn. 2 (1976). In the case sub judice, the predecessor's employees worked regular shifts performing the regular work of HBS with no known definite or contemplated date for their termination. Hence, they were not temporary employees. The fact HBS's management may have talked amongst themselves that the employees were temporary is of no consequence because such was not timely communicated to the employees.

I likewise find HBS's contention that the employees herein were independent contractors to be without merit. Although President Yoo attempted to explain, via a letter read to the employees on December 9, that their status with HBS was that of independent contractors, the evidence demonstrates their duties and functions were not thereafter changed at all. The employees were still required to follow the instructions of HBS's supervisors and they were not told to supply any of their own equipment to accomplish their assigned tasks. In fact, Contract

Manager Darby testified he knew of no independent decision that any employee made after they were told they were independent contractors. Leadperson Johnson testified that at all relevant times herein, the employees had to perform their tasks the way HBS wanted them to in order to continue working for HBS. There were never any contracts between the employees and HBS with respect to their being independent contractors. In rejecting HBS's contentions, I conclude the employees had no "right of control" of either the means or the ends of their jobs and as such cannot be found to be independent contractors. See, e.g. *Merry Oldsmobile, Inc.*, 287 NLRB No. 86 at sl. op. p. 4 (1987). The fact the employees were required to sign an IRS W-9 "Payer's Request for Taxpayer Identification Number and Certification" form is of no consequence because the employees were told they would not be paid nor could they enter the buildings to perform their duties unless they signed such forms.

In summary and on the basis of the record evidence and for the reasons outlined above, I conclude HBS is a successor to its predecessor, Housekeepers, with which the Union had a collective-bargaining agreement effective at the time HBS took over the GSA custodial services contract for the Austin Federal Buildings. As a successor, HBS had an obligation to bargain with the Union on and after the Union made its demand on December 9. In light of the above and inasmuch as HBS does not dispute that it did not bargain with the Union about (1) the reduction in hours of the unit employees on or about December 9, (2) the termination on December 11 of approximately 11 unit employees that had been employed by its predecessor, and (3) ceasing making payments to the

employees' pension fund, annual benefit fund, and health and welfare funds, I find it violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Houston Building Service, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Unlicensed Division of District Number 1, MEBA/NMU, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Houston Building Service, Inc. is the successor of Housekeepers Maintenance Service and Supply, Inc.

4. All custodial service employees employed by HBS for the GSA at the Austin Federal Buildings in Austin, Texas, excluding all other employees and supervisors as defined in the Act constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. Unlicensed Division of District Number 1, MEBA/NMU, AFL-CIO, has been, and is, the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. By refusing on or about December 9, 1987, and at all times thereafter to recognize and bargain collectively with the above-named labor organization as the exclusive representative of all its employees in the appropriate unit, HBS has engaged in, and is engaging in, unfair labor

practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By unilaterally reducing the hours of work of its employees in the aforesaid unit on or about December 9 and by unilaterally terminating 11 employees in the aforesaid unit on or about December 11 and by ceasing to make payments to the employees' pension fund, annual benefit fund, and health and welfare funds, HBS has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that HBS has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

I shall order HBS to recognize and, on request, to bargain with the Union as the exclusive representative of all its employees in the appropriate unit, which unit is described elsewhere in this Decision. I shall order HBS to rescind on the Union's request the unilateral changes in unit employees' wages, hours, and terms and conditions of employment implemented on and after December 9, and to make all affected unit employees whole for losses they incurred by virtue of its unilateral changes to their wages, fringe benefits, and other terms and conditions of employment in accordance with *Ogle Protection Service,*

183 NLRB 682 (1970) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB No. 181 (1987).[24] Specifically, I order that HBS make whole all affected unit employees for any losses they incurred by virtue of the reduction in their hours of work on December 9. HBS shall remit all payments it owes to the employee pension fund, annual benefit fund, and health and welfare funds; and, reimburse its employees in the manner set forth in *Kraft Plumbing and Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for expenses, if any, resulting from its failure to make these payments. Any amounts that HBS must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979). Having found that HBS unilaterally terminated Joyce Marie Altum, Clifton Bailey, Kennie Grady, DuTriem Kim, Maria Menchacha, Jessie Irene Meyer, Rita C. Morales, Benny Henry Pamplin, Willie Belle Piper, Frances Cortez Ramirez, and Onnie Lee Walker, I shall order HBS to offer them immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing if necessary persons hired on or after December 9, and make them whole for any loss of earnings and benefits in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950) and *New Horizons*, supra. I shall also

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[24] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621. I note that no interest accrued before January 1, 1987.

order HBS to remove from its records all references to their terminations and notify them in writing this has been done, and that evidence of that unlawful action will not be used as a basis for any future personnel action against them. Finally, it is ordered that HBS post a notice to its employees attached hereto as "Appendix" for a period of 60 days in order that employees may be apprised of their rights under the Act and HBS's obligation to remedy its unfair labor practices.

On these findings of fact, conclusions of law, and on the entire record, I issue the following recommended:[25]

ORDER

The Company, Houston Building Service, Inc., Austin, Texas, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain in good faith with Unlicensed Division of District Number 1, MEBA/NMU, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit described elsewhere in this Decision by:

(i) unilaterally changing wages, hours, and other terms and conditions of employment for bargaining unit employees;

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[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(ii) unilaterally terminating bargaining unit employees without timely notice to, and/or bargaining in good faith with, the Union about such terminations;

(iii) unilaterally refusing to make payments to the employee pension fund, annual benefit fund, and health and welfare funds.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the polices [sic] of the Act:

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All custodial service employees employed by Houston Building Service, Inc. for the General Services Administration at the Veteran's Administration Data Processing Center, U. S. Treasury Disbursing Center, and the Veteran's/Internal Revenue Service Warehouse in Austin, Texas, excluding all other employees and supervisors as defined in the Act.

(b) Make whole all affected unit employees for any losses they may have suffered by virtue of the reduction in their hours of work on December 9, 1987.

(c) Offer Joyce Marie Altum, Clifton Bailey, Kennie Grady, DuTriem Kim, Maria Menchaca, Jessie Irene Meyer, Rita C. Morales, Benny Henry Pamplin,

Willie Belle Piper, Frances Cortez Ramirez, and Onnie Lee Walker immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary any persons hired into the bargaining unit on and after December 9, 1987, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in "The Remedy" section of this Decision.

(d) Remove from its files any reference to the termination of the employees referred to in paragraph (c) above, and notify them in writing this has been done and that these actions will not be used against them in any way.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Austin, Texas, facilities copies of the attached notice marked "Appendix."[26] Copies of the

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[26] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 16,[27] after being signed by HBS's authorized representative, shall be posted by HBS immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by HBS to ensure that the notices are not altered, defaced, or covered by any other materials.

(g) Notify the Regional Director for Region 16 in writing within 20 days from the date of this Order what steps HBS has taken to comply herewith.

Dated, Washington, D.C. December 16, 1988

/s/ William N. Cates
William N. Cates
Administrative Law Judge

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[27] As is noted elsewhere in this Decision, Region 23 of the Board no longer exists as a Region, but rather as a subdivision of Region 16.

"APPENDIX"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and, on request, bargain in good faith with Unlicensed Division of District Number 1, MEBA/NMU, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit described below.

WE WILL NOT changes [sic] wages, hours, and other terms and conditions of employment for bargaining unit employees, by failing and refusing to make payments to the employee pension fund, annual benefit fund, and health and welfare funds; by reducing the hours of work of unit employees' and, by unilaterally terminating unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All custodial service employees employed by Houston Building Service, Inc. for the General Services Administration at the Veteran's Administration Data Processing Center, U. S. Treasury Disbursing Center, and the Veteran's/Internal Revenue Service Warehouse in Austin, Texas, excluding all other employees and supervisors as defined in the Act.

WE WILL make whole all unit employees for any loss of benefits suffered as a result of their hours of work being reduced on December 9, 1987.

WE WILL offer immediate and full reinstatement to Joyce Marie Altum, Clifton Bailey, Kennie Grady, Du-Triem Kim, Maria Menchaca, Jessie Irene-Meyer, Rita C. Morales, Benny Henry Pamplin, Willie Belle Piper, Frances Cortez Ramirez, and Onnie Lee Walker to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging if necessary any persons hired into the bargaining unit on or after December 9, 1987, and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination against them.

WE WILL notify each of the above-listed employees in writing that we have removed from our files any reference to their termination on December 11, and such actions will not be used against them in any way.

WE WILL make whole our employees in the unit described above by making payments into the employee pension fund, annual benefit fund, and health and welfare funds that we have failed to make since on or after December 9, 1987 and by reimbursing those employees for any loss of benefits they may have suffered because of our failure to make such payments.

HOUSTON BUILDING SERVICE, INC.
(Employer)

Dated: ___ By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 819 Taylor Street, Room 8A24, Fort Worth, Texas 76102-6178. Telephone: (817) 334-2941.

APPENDIX C

Ch. 7 LABOR-MANAGEMENT RELATIONS 29 § 160

SUBCHAPTER II – NATIONAL LABOR RELATIONS – Cont'd

§ 160. Prevention of unfair labor practices – Powers of Board generally

(a) This Board is empowered; as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating

the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such

unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who had been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Modification of findings or orders prior to filing record in court

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Petition to court for enforcement of order; proceeding; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of

appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or made new findings by reason

of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection

(e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Institution of court proceedings as stay of Board's order

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

Jurisdiction of courts unaffected by limitations prescribed in sections 101 to 115 of this title

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

Expeditious Hearings on petitions

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

Injunctions

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Hearings on jurisdictional strikes

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law; *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period; *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge

against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony; *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.

APPENDIX D

SUBCHAPTER II – NATIONAL LABOR RELATIONS – Cont'd

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if

such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he had reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section

157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any

agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

No. 91-597

Supreme Court, U.S.
FILED
OCT 30 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

HOUSTON BUILDING SERVICE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and UNLICENSED DIVISION OF DISTRICT NO. 1, MEBA/NMU, AFL-CIO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNLICENSED DIVISION OF DISTRICT NO. 1, MEBA/NMU, AFL-CIO

GEORGE J. CAPPIELLO, JR.
Counsel of Record
SIDNEY H. KALBAN
PHILLIPS CAPPIELLO KALBAN
HOFMANN & KATZ, P.C.
Attorneys for Respondent
Unlicensed Division of District No. 1,
MEBA/NMU, AFL-CIO
360 West 31st Street
New York, New York 10001
(212) 465-8840

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QUESTIONS PRESENTED

1. Whether the finding and conclusion of the National Labor Relations Board that Houston Building Services, Inc. ("HBS"), had an obligation to recognize and bargain with the Unlicensed Division of District No. 1, MEBA/NMU, AFL-CIO*, is supported by substantial evidence in the record when considered as a whole.

2. Whether the Board's conclusion that HBS unlawfully changed terms and conditions of employment without first bargaining with the Union is supported by substantial evidence in the record when considered as a whole.

3. Whether an employer which hires the employees of its predecessor without advising them that they are to be employed on a temporary basis is obligated to recognize and bargain with the Union which had a collective bargaining relationship with the predecessor, when the majority of the successor employer's employees had been employed at the same location by the predecessor and had performed the same duties under similar supervision.

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* The Union is affiliated with the National Marine Engineers' Beneficial Association, AFL-CIO.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Statement of the Case 2

Summary of the Argument 3

Reasons for Denying the Writ 4

Conclusion 7

TABLE OF CITATIONS

Cases Cited:

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 3, 4, 5, 7

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) 3, 4, 5, 7

Rule Cited:

Rule 10 of Rules of Supreme Court of United States 6

No. 91-597

In The

Supreme Court of the United States

October Term, 1991

HOUSTON BUILDING SERVICE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and UNLICENSED DIVISION OF DISTRICT NO. 1, MEBA/NMU, AFL-CIO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNLICENSED DIVISION OF DISTRICT NO. 1, MEBA/NMU, AFL-CIO

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 926 F.2d 178 (1991). That opinion affirmed the decision and order of the National Labor Relations Board ("NLRB" or "Board"), which is reported at 296 NLRB No. 101 (1989).

Contrary to the statement set forth on page 2 of the petition for writ of certiorari filed herein, there was no formal finding "in favor of HBS" by the NLRB Regional Director herein nor any appeal by the Board. Rather, the Regional Director initially refused to issue complaint based upon the charge filed by the Unlicensed Division of District No. 1, MEBA/NMU, AFL-CIO ("Union"), but was overruled by the Board's general counsel upon the Union's appeal and thereupon issued the complaint which gave rise to the administrative hearing below.

STATEMENT OF THE CASE

While the facts stated in Sections "1", "2" and "3" of the petitioner's Statement (at pp. 3-5 of its petition for writ of certiorari) are essentially correct, many salient facts are omitted.[1] Assuming *arguendo* that petitioner Houston Building Service, Inc. ("HBS" or "petitioner"), did intend to hire employees other than those of its predecessor but was unable to do so because it was not able to obtain security clearances,[2] it admitted (and the NLRB appropriately found) that all of its initial employees had been employed by its predecessor and that it had to keep those employees on the job in order to be able to fulfill its contract with the government (*see* J.A. 2a, 18a-20a, 24a-25a). HBS, moreover, admitted that it did not inform the employees that they were hired on a temporary basis (*see* J.A. 6a, 8a-9a [fn. 2], 18a-20a, 31a-32a). According to petitioner's attorney during oral argument before the Fifth Circuit, HBS could not have advised the employees

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1. Sections "4" and "5" of the Statement are actually argument and, therefore, will not be addressed in this portion of respondent Union's brief in opposition.

2. HBS's motivation or anti-union animus was not a factor which had to be proven to establish the unfair labor practices alleged in this proceeding and, consequently, was not litigated before the NLRB.

of their purported temporary status as they may then have refused to work for the company under those conditions and the company's president, Jason Yoo, was "desperate" in his need for them at that time.

Petitioner's rendition of the facts of this case also omits the finding of the NLRB, based on the undisputed evidence, that, at the request of HBS's supervisors, its predecessors' workers completed employment applications and union cards, some before and some after that company had become the contractor at the Austin federal buildings. The employees reported for work on the first day HBS became the contractor and performed their duties, as they had done during the other changes of employer over the prior several years. (*See* J.A. 5a, 17a, 19a-20a, 29a.) These employees performed the same work at the same locations for, essentially, the same supervisors as they had under HBS's predecessor (J.A. 29a-30a).

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit does not conflict at all with the precedent of this Court, but rather is fully in compliance with that precedent. As HBS mysteriously mentions only twice[3] and in passing, the "decision" with which it asserts the Court of Appeals' determination is in conflict is, in fact, not the holding of this Honorable Court at all, but a dissenting opinion in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972) ("*Burns*"). The decision below faithfully follows the decisions of this Honorable Court in *Burns* and in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) ("*Fall River*"),

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3. Once in a footnote to its statment of the "Questions Presented" (at which petitoner inconsistently refers to "the favorable decision of Mr. Chief Justice Rehnquist . . . in his dissent") and the other time in the first heading of its argument.

to which this Court should continue to adhere. Petitioner, therefore, has not stated a valid basis for this Honorable Court to grant a writ of certiorari herein.

REASONS FOR DENYING THE WRIT

The decision by the Court of Appeals is consistent with the precedent established by this Honorable Court.

In *Fall River, supra* at 43, this Court held that, when analyzing whether a successorship situation exists, the Board is to view the facts from the perspective of the employees — *i.e.*, whether they perceive themselves as being "in essentially the same jobs after the employer transition . . . " This is precisely what the NLRB and the Fifth Circuit did in this case when they determined that the employees who had worked for HBS's predecessor viewed themselves as continuing to perform the same duties for HBS as they had always performed at the locations in question and that HBS had not given them any reason to believe that they were temporary employees. The alleged short-term necessity of employing these workers and the supposed plans of HBS to bring in other workers if and when they received security clearances[4] is, accordingly, irrelevant.

Petitioner tries to distinguish *Fall River* by asserting that it did not purchase its predecessor or any of its predecessor's assets, but "merely" took over its employees to perform the same duties at the same location under, generally, the same supervision. These facts, thus, are strikingly similar to the situation in *Burns*, which this Court reaffirmed in its decision in *Fall River*. That earlier case involved a contractor which took over the guard service operation for a third party from a competitor, hiring the same

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4. Some of the new employees supposedly hired by HBS never received their security clearances and were never employed in the unit (J.A. 17a-18a).

people to perform the same work at the same location. This Court required that successor to recognize and bargain with the union which had been the employees' representative when they worked for the predecessor, as the bargaining unit was basically unchanged. *Burns, supra* at 280-281.

The central holding of both *Burns* and *Fall River* is that:

> If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.

Fall River, supra at 41 (emphasis in original).

The findings in the current proceeding were that HBS made a conscious decision to bid for and perform the work that had been performed at the federal buildings in Austin, Texas, by its predecessor and that it intended to and did "take advantage of the trained work force of its predecessor." (*See* J.A. 2a, 6a, 29a-31a.) HBS has admitted that it needed to keep the employees at their jobs because they were the only ones with the necessary security clearances at that time and, without them, it would not have been able to provide the services required by the government. Given its alleged intent to replace those workers, HBS took advantage of them in another sense as well — intentionally failing to inform them that they would only be kept temporarily because it knew they would not otherwise agree to work for it.

Burns has been followed by the NLRB and the courts for

almost twenty years[5] and has helped stabilize collective bargaining relationships, as its holding provides for continuity of representation by the employees' chosen labor organization. This is particularly true in the service contract industry involved in this proceeding. As was noted by the court below (J.A. 2a), HBS was the fifth employer of this unit in seven years. Thus, if the Union had to seek NLRB certification each time there was a change of employer and to pursue unfair labor practice charges once the employer continued its refusal to recognize and bargain, the employer would have departed before there was an enforceable order and the unit employees would effectively be deprived of their right to representation. Significantly, by the time oral argument was scheduled before the Court of Appeals in this case, petitioner was no longer the employer of the unit at the Austin federal buildings.

It must, therefore, be concluded that the Fifth Circuit's decision is consistent with the well-considered precedents of this Honorable Court; and that HBS has utterly failed to state a valid basis under Rule 10 of the Rules of the Supreme Court of the United States for a writ of certiorari to be granted.

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5. Interestingly, petitioner has not been able to cite a single decision by any Court of Appeals which supports its premise that a successor service contractor should be treated any differently than a purchaser of assets.

CONCLUSION

For the foregoing reasons, this Honorable Court should deny HBS's petition for writ of certiorari herein and should adhere to its decisions in *Burns* and *Fall River*.

Respectfully submitted,

GEORGE J. CAPPIELLO, JR.
Counsel of Record
SIDNEY H. KALBAN
PHILLIPS CAPPIELLO
KALBAN HOFMANN & KATZ, P.C.
Attorneys for Respondent
Unlicensed Division of District No. 1, MEBA/NMU, AFL-CIO

Supreme Court, U.S.
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No. 91-597

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON BUILDING SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner was a successor employer.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

California v. *FERC*, 110 S. Ct. 2024 (1990)	8
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987)	5, 8, 9
Golden State Bottling Co. v. *NLRB*, 414 U.S. 168 (1973)	9
Hilton v. *South Carolina Public Railways Comm'n*, No. 90-848 (Dec. 16, 1991)	8
NLRB v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972)	5, 6, 7
Square D Co. v. *Niagara Frontier Traffic Bureau, Inc.*, 476 U.S. 409 (1986)	8
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	9

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 7, 29 U.S.C. 157	5
§ 8(a)(1), 29 U.S.C. 158(a)(1)	4, 5
§ 8(a)(5), 29 U.S.C. 158(a)(5)	4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1991

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 936 F.2d 178. The decision and order of the National Labor Relations Board (Pet. App. 7a-43a) is reported at 296 N.L.R.B. No. 101.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1991. The petition for a writ of certiorari was filed on September 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, the Unlicensed Division of District No. 1, MEBA/NMU, AFL-CIO (Union) became the recognized collective bargaining representative of a unit of approximately 30 custodial services employees working for Nash Janitorial Services, Inc. (Nash). Nash provided janitorial services for the General Services Administration (GSA) at three federal buildings in Austin, Texas. Pet. App. 12a-14a. The service contract was periodically rebid. Between 1980 and 1987, five successive employers assumed responsibility for providing janitorial services for GSA. Each hired the employees of its predecessor and maintained a collective bargaining relationship with the Union. *Id.* at 14a-15a. The last contractor prior to petitioner, Housekeepers Maintenance Service and Supply, Inc. (Housekeepers), had a collective bargaining agreement with the Union effective August 1986 through October 1989. *Id.* at 15a.

In 1987, GSA solicited bids for the custodial contract. Pet. App. 15a. Petitioner was the successful bidder. *Id.* at 18a. Before winning the bid, a representative of petitioner solicited and received from the Union the current collective bargaining agreement and an employee seniority list. *Id.* at 15a-16a. Petitioner's president, Jason Yoo, also discussed with Eugene Darby, the janitorial services manager for Housekeepers, the possibility of retaining Darby if petitioner were awarded the contract. *Id.* at 16a. Yoo mentioned to Darby that he desired to hire new employees. Darby told Yoo that it could take up to a month to obtain the security clearances needed.[1] Yoo

[1] To be employed in the federal buildings in Austin, each employee required a security clearance. Pet. App. 16a n.8.

believed that the clearances could be obtained more quickly. *Id.* at 16a & n.8.

Petitioner's contract obligations commenced on December 1, 1987. On November 25, petitioner made conditional job offers to 18 individuals, not members of the Housekeepers workforce, to work at the federal buildings, contingent on their obtaining the required security clearances. Some of those applicants failed to receive clearances and were never hired by petitioner to work at the federal buildings. Pet. App. 17a-18a & n.11. On December 1, when petitioner began performing the janitorial services contract, its entire rank-and-file workforce consisted of the 30 former Housekeepers employees. Darby, as well as two other former Housekeepers supervisors, also were hired by petitioner. *Id.* at 19a.

On December 2 or 3, Darby distributed job application forms to the former Housekeepers employees, as well as union authorization forms. The employees completed and returned the forms. Pet. App. 19a. Petitioner began to add new employees as they received security clearances. The former Housekeepers employees, however, constituted a majority of its workforce.[2] *Id.* at 30a-31a.

On December 9, petitioner refused the Union's request for recognition and notified GSA that it intended to subcontract its custodial work. Pet. App.

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[2] One new employee and two new supervisors began working on December 3 and 4. During the week of December 6 through 12, petitioner's maximum employee complement included the original workforce of 30 employees and 3 holdover supervisors, plus 10 new employees and 2 new supervisors. During the week of December 14 through 19, its employee complement included 16 of the original unit employees, 2 holdover supervisors, 11 new employees, and 2 new supervisors. Pet. App. 23a-24a, 30a-31a.

21a-22a. Thereafter, petitioner unilaterally reduced working hours and terminated all of the night shift employees. *Id.* at 23a. Petitioner never bargained with the Union and failed to make contributions to employee benefit funds. *Id.* at 24a.

2. The Union filed unfair labor practice charges against petitioner. The Board, upholding the decision of the administrative law judge (ALJ), found that petitioner was a successor to Housekeepers and accordingly obligated to recognize and bargain with the Union. Pet. App. 9a, 29a. The ALJ found that there was "substantial continuity" between petitioner and Housekeepers. *Id.* at 28a. The ALJ explained that petitioner's "operations and functions" were the same as those of its predecessor. *Id.* at 29a. On commencing work, the ALJ noted, petitioner "utilized the exact same workforce performing the same jobs under the same working conditions and with the same supervisors that had been utilized by [Housekeepers]." *Id.* at 30a. The ALJ also observed that the services performed by the employees continued without interruption. *Ibid.*

The ALJ further found that by December 9, when the Union requested recognition, petitioner "employed a full workforce with all job classifications filled." Pet. App. 31a. The ALJ and the Board rejected petitioner's assertion that the Housekeepers' employees hired by petitioner were temporary employees. The ALJ and the Board noted that the employees were never told they were temporary. *Id.* at 8a n.2, 32a. The ALJ further noted that there was "no known definite or contemplated date for their termination." *Id.* at 32a.

Based on those findings, the Board concluded that petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5)

and (1), by refusing to recognize and bargain with the Union and by making unilateral changes in working conditions.[3] Pet. App. 9a, 35a.

3. The court of appeals enforced the Board's order. Pet. App. 6a. The court concluded that the Board's finding that petitioner was a successor to Housekeepers was supported by substantial evidence. Citing *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), and *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), the court noted that the Board properly takes into account "the totality of the circumstances" in determining whether there has been "substantial continuity" between the old and new employers. Pet. App. 3a-4a. The court observed that one of the "most significant" factors in determining successorship "is the overlap of workforces between the two entities." *Id.* at 4a. The court rejected petitioner's assertion that, because it acquired no assets from Housekeepers, there could be no finding of successorship. The court explained that "[t]ransfer of ownership of assets * * * is only one factor" to be considered in determining whether "the second corporation basically has continued the business and workforce of the first." *Id.* at 6a n.2. On the facts of this case, the court of appeals observed that, when the Union made its bargaining demand, all of petitioner's employees "were former Housekeepers workers who were performing identical work to that which they had done under Housekeepers. The

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[3] Section 8(a)(5), 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it unfair labor practice for an employer to "restrain, coerce, or interfere with" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

working conditions, production process, and customers remained unchanged." *Id.* at 5a.

The court of appeals rejected petitioner's assertion that under the Board's ruling, petitioner was precluded from hiring its own permanent workforce. The court explained that, if petitioner had desired to hire its own employees and to treat the original unit employees as a temporary workforce, it could have simply told those employees that their status was temporary. Instead, the court noted, petitioner gave the employees job applications and union cards, thus misleading the employees into believing that their status was permanent. Petitioner "did nothing to combat the impression that any reasonable employee would have in these circumstances that the 'new' job merely was a continuation of the old." *Id.* at 5a-6a.

ARGUMENT

1. Petitioner contends (Pet. 7-8) that the Board misapplied the successorship doctrine in this case by finding that petitioner was a successor firm even though it did not acquire the assets of its predecessor. That contention is foreclosed by *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972).

In *Burns*, the Court sustained the Board's determination that Burns, as the successful bidder to a contract previously performed by Wackenhut Corporation to furnish guard services, was required to bargain with the union that had represented Wackenhut's employees. 406 U.S. at 277-281.[4] The Court

[4] The Court rejected the Board's position that the successor was required to assume the predecessor's collective agreement. 406 U.S. at 291. The Court held instead that a successor who retains the predecessor's workforce is required to consult with the collective bargaining representative of those em-

concluded that imposing a bargaining obligation is appropriate when the new employer maintains substantial continuity in the operation of its predecessor's business so that "the bargaining unit remains unchanged" and "a majority of employees after the change of ownership or management were employed by the preceding employer." *Id.* at 279, 281. The dissent in *Burns* argued that the successorship doctrine should not apply since there had been no transfer of assets. 406 U.S. at 296-310 (Rehnquist, J., dissenting). The Court, however, refused to accept that principle. Instead the Court quoted with approval the court of appeals' finding that "[a]ll of the important factors which the Board has used and the courts have approved are present in the instant case: 'continuation of the same types of product lines, departmental organization, employee identity and job functions.' " *Id.* at 280 n.4.[5]

Petitioner does not dispute that, under the Court's decision in *Burns*, a finding of successorship is warranted in this case; it simply urges (Pet. 8-9) adoption of the dissenters' view in *Burns* that the successorship doctrine should not apply in the absence of some transfer of assets. Petitioner, however, has advanced no reason why the Court should depart from the doctrine of *stare decisis*. *Burns* has been settled

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ployees before changing their terms and conditions of employment. *Id.* at 294-295.

[5] The Court added that the Board had found that both Burns and Wackenhut "performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally * * * Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42." 406 U.S. at 280 n.4.

law for nearly twenty years, and its reasoning was recently reaffirmed and applied by this Court in *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 36-41 (1987). There is no justification for revisiting that statutory issue. See *Hilton* v. *South Carolina Public Railways Comm'n*, No. 90-848 (Dec. 16, 1991), slip op. 4 ("Time and again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.' * * * Adherence to precedent promotes stability, predictability, and respect for the judicial authority."); *California* v. *FERC*, 110 S. Ct. 2024 (1990); *Square D Co.* v. *Niagara Frontier Traffic Bureau, Inc.*, 476 U.S. 409 (1986).

2. Nor is there merit to petitioner's suggestion (Pet. 11) that *Fall River* requires the Board to "focus on whether the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial changes, the predecessor's business operations.'" On the contrary; the Court in *Fall River* reiterated that, "[i]f the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of [Section] 8(a)(5) is activated." 482 U.S. at 41. The Court went on to state that *Burns* had approved "the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old," and that this approach "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Id.* at 43. "Under this approach, the Board examines a number of factors," such as "whether the business of both employers is essentially the same" and "whether the employees of the new company are doing the same jobs in the same

working conditions under the same supervisors." *Ibid.*

While the Court in *Fall River* noted that the Board will also examine "whether the new company has 'acquired substantial assets of its predecessor,'" 482 U.S. at 43, quoting *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973), it was not suggesting that this factor is essential to a finding of successorship. Rather, the statement merely reflects the fact that the acquisition of assets, which occurred in *Fall River* and *Golden State*, is a factor to be considered in determining whether there is "substantial continuity" between the old company and the new one. *Fall River* stated, however, that the essential question is whether "those employees who have been retained will understandably view their job situations as essentially unaltered." 482 U.S. at 43.

Here, as in *Burns*, while there was no assets acquisition, the other indica of continuity were sufficient to justify the Board in concluding that the employees would "view their job situations as essentially unaltered." As the court of appeals noted, petitioner "chose to rehire a workforce that had grown accustomed to new owners adopting the collective bargaining arrangements of former employers"; petitioner "not only rehired those same workers, but did so in a manner which would indicate that the same practice was continuing"; and the "operations * * * remain[ed] essentially the same after the transfer of ownership." Pet. App. 6a. The court of appeals' determination that the Board's order is supported by substantial evidence warrants no review here. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[6]

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[6] Petitioner's statement of the questions presented (Pet. i) appears to raise the issue of whether successorship can be

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

JANUARY 1992

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found when employment of the predecessor's employees is "forced" and "temporary" as a result of the government's failure to grant security clearances quickly. Petitioner does not argue that point in the body of the petition, and it raises at most a fact specific issue that does not warrant this Court's review. In any event, the Board, upheld by the court of appeals, found that petitioner never told the predecessor's employees that their employment was temporary, but instead treated them as permanent employees. Pet. App. 5a-6a. Accordingly, this case does not present any issue of forced temporary hiring.

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